No. 88-1895

Supreme Court, U.S.
FILED
JUL 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

MARK C. SMITH, III, ET AL., PETITIONERS

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JORDAN LUKE
General Counsel
Federal Home Loan Bank Board
Washington, D.C. 20552

QUESTION PRESENTED

Whether, in partially reversing an order granting summary judgment, the court of appeals erred in remanding the case for further proceedings rather than directing the district court to enter summary judgment in favor of the appellants.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	5

TABLE OF AUTHORITIES

Case:

Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Aroostock R.R.*, 389 U.S. 327 (1967) 5

Statutes:

Federal Home Loan Bank Act, 12 U.S.C. 1421 *et seq.* ... 2
12 U.S.C. 1464(d)(6) (Supp. V 1987) 2
National Housing Act, Tit. IV, 12 U.S.C. 1724 *et seq.* ... 2
12 U.S.C. 1729(c)(1)(B) 2
12 U.S.C. 1729(c)(2) 2

Miscellaneous:

J. Kusnet & J. Antopol, *Modern Banking Forms* (3d ed. 1983) 4
C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* (1983) 4

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1895

MARK C. SMITH, III, ET AL., PETITIONERS

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) and the memorandum and order of the district court are unreported.

JURISDICTION

The court of appeals entered its judgment on January 18, 1989, and a petition for rehearing was denied on February 16, 1989. Pet. App. A13. The petition for a writ of certiorari was filed on May 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On July 22, 1983, Royal Bienville Investors (RBI) executed a promissory note in favor of Audubon Federal Savings and Loan Association in the amount of $500,000. Petitioners, who include the personal endorser and co-makers of the note, simultaneously executed a continuing guaranty in favor of Audubon that assured the repayment of "any indebtedness, direct or contingent, of [RBI] * * * for advances made under line of credit" (Pet. App. A4). On September 23, 1983, RBI executed a second promissory note in favor of Audubon in the amount of $4,000,000. In 1984, Royal St. Charles, Ltd., (RSC) assumed the obligations set forth in the notes and RBI became a limited partner of RSC. Shortly thereafter, RSC filed for protection under Chapter 11 of the Bankruptcy Code and became involved in a plan of reorganization. Pet. App. A3-A5.

On June 19, 1986, the Federal Home Loan Bank Board determined that Audubon was insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver for the institution.* FSLIC instituted suit in the United States District Court for the Eastern District of Louisiana to collect the unpaid balance, plus interest and

---

*The Bank Board is an independent agency in the Executive Branch of the United States organized pursuant to the Federal Home Loan Bank Act, 12 U.S.C. 1421 *et seq.* Congress has given the Bank Board broad powers over the operation of the savings and loan industry, including the power to appoint FSLIC as conservator or receiver for a federally insured savings and loan association, ex parte and without prior court approval, if the Bank Board determines that the statutory grounds exist. 12 U.S.C. 1464(d)(6), 1729(c)(1)(B) and (c)(2) (Supp. V 1987). The Bank Board is also the operating head of FSLIC, a corporate governmental agency that is responsible, pursuant to Title IV of the National Housing Act, 12 U.S.C. 1724 *et seq.*, for insuring the accounts of all federally-chartered savings and loan associations and most state-chartered savings and loan associations.

attorney's fees, on the notes executed by RBI, which were in default. During the course of that proceeding, FSLIC filed a motion for summary judgment to enforce petitioners' guaranty of repayment. Petitioners filed a cross-motion for summary judgment, arguing that the guaranty did not apply to the notes because they were not part of a "line of credit" and that, in any event, the Chapter 11 reorganization of RSC had produced a "novation" of the notes that discharged the guarantors' obligations. Pet. App. A5-A6.

The district court granted FSLIC's motion for summary judgment and denied petitioners' cross-motion, ruling that the guaranty obligated petitioners to repay the notes and that the Chapter 11 reorganization did not release petitioners from that obligation. See Pet. App. A8, A11-A12. The court of appeals affirmed in part and reversed in part. *Id.* at A1-A12. The court of appeals agreed that the reorganization did not release petitioners from their guaranty obligation (*id.* at A11-A12). It concluded, however, that petitioners' contention that the guaranty did not apply to the notes at issue raised a genuine issue of material fact and that summary judgment on the question was therefore inappropriate (*id.* at A7-A11). The court of appeals remanded the case to the district court "for determination of the intent of the parties or, if no specific intent existed, the trade usage, if any, of the phrase 'line of credit,' and resolution of this dispute consistent with that determination" (*id.* at A10-A11).

ARGUMENT

Petitioners do not challenge the court of appeals' ruling affirming in part and reversing in part the district court's grant of summary judgment. Instead, they contend that the court of appeals erred in remanding the case to the dis-

trict court for further proceedings. Specifically, they take issue with the court's conclusion that the phrase "line of credit" does not have a clearly defined meaning in this context (Pet. App. A8) and that the record in this case "does not contain a sufficient basis for a definitive ruling, as a matter of law, on the meaning to be ascribed to the words 'line of credit' as used in the continuing guaranty" (*id.* at A9). Petitioners' arguments are incorrect and, in any event, do not warrant review by this Court.

Petitioners contend that the "record in this case indisputably shows" that the notes at issue were not part of a "line of credit" (Pet. 9-10). However, petitioners point to nothing in the record supporting that assertion. They rely solely on a passage from a legal form book describing the uses of a "line of credit" (Pet. 10-11 (citing J. Kusnet & J. Antopol, *Modern Banking Forms* 1-8 (3d ed. 1983)). That passage, which describes but does not define "lines of credit," fails to demonstrate "a clear, concise, and well-established usage of the term" (Pet. 10). Indeed, although the court of appeals and the district court disagreed on whether the guaranty's use of the term "line of credit" *must have* referred to the loans at issue here, both courts rejected petitioners' contention that the term *could not possibly* apply to those extensions of credit. See Pet. App. A8-A9.

Given the existence of a genuine issue of material fact, the court of appeals quite properly concluded that the case should be remanded for further proceedings. See, *e.g.*, C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2716 (1983 & Supp. 1988) (collecting cases). It is well settled that "the reviewing court only may determine whether a genuine issue exists and whether the law was applied correctly; it cannot decide disputed issues of material fact. Accordingly, it must reverse the grant of a summary judgment motion if it appears from the record that there is

an unresolved issue of material fact; it cannot simply substitute a judgment for the appellant." *Id.* at 654-657 (footnotes omitted).

The court of appeals thus acted properly in rejecting petitioners' request for summary judgment. In any event, the matter does not warrant this Court's review. The court of appeals' decision turns on the interpretation of a particular contract and involves a matter to be clarified by the proceedings on remand. The decision, moreover, does not conflict with any decision of this Court or another court of appeals. Thus, this interlocutory dispute is not ripe for this Court's review. See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327 (1967).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JORDAN LUKE
General Counsel
Federal Home Loan Bank Board

JULY 1989

U.S. GOVERNMENT PRINTING OFFICE 1989—241 699/00351